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**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA**

In Re DYNAMIC RANDOM ACCESS  
 MEMORY (DRAM) ANTITRUST  
 LITIGATION

MASTER FILE NO. M-02-1486 PJH

MDL NO. 1486

This Document Relates To:

**JOINT APPLICATION FOR RELIEF  
 FROM AMENDED PRETRIAL ORDER  
 NO. 1**

*Kinkade, et al., v. Micron Technology, Inc., et al.*, (3:05-cv-01883-PJH)

*Kaplan v. Micron Technology, Inc., et al.*,  
 (Transferred from M.D.N.C. on June 23,  
 2005)

CTRM: 3, 17th Floor  
 JUDGE: Honorable Phyllis J. Hamilton

*Microprocessor Designs, Inc. v. Micron  
 Technology, Inc., et al.*, (Transferred from D.  
 Vt. on June 23, 2005)

*Greene v. Micron Technology, Inc., et al.*,  
 (3:05-cv-01884-PJH)

1 Plaintiffs Mike Kinkade (“Kinkade”), Leonard M. Kaplan (“Kaplan”) and Microprocessor  
2 Designs, Inc. (“Microprocessor”), representative plaintiffs in DRAM indirect purchaser actions  
3 originally filed in state court and then removed and transferred from Tennessee, North Carolina  
4 and Vermont, respectively, file this Joint Application for Relief from the Amended Pretrial Order  
5 No. 1, entered by this Court on May 1, 2003. This Application collectively refers to Kinkade,  
6 Kaplan, Microprocessor, and Greene as “Indirect Plaintiffs.”

7 Pursuant to Amended Pretrial Order 1, paragraph 2(b), all subsequently filed or transferred  
8 cases are subject to the terms of that Order unless the new party objects to its application within 10  
9 days after it is served on the new party.

10 On June 21, 2005, Plaintiffs Kinkade, Kaplan and Microprocessor were served with PTO  
11 No. 1. Plaintiff Greene has not been served with PTO No. 1, and pursuant to paragraph 3 of that  
12 PTO, is currently under no obligation to seek relief from it. Nevertheless, to conserve party and  
13 Court resources, plaintiff Greene joins plaintiffs Kinkade, Kaplan and Microprocessor in this Joint  
14 Application for Relief from the Amended Pretrial Order No. 1.

15 **I. PROCEDURAL HISTORY**

16 The *Kinkade* action was originally filed in Tennessee state court. Defendants removed the  
17 *Kinkade* case and plaintiff properly filed his motion to remand, but the case was transferred to this  
18 Court before the district court in Tennessee ruled on the motion.

19 The *Kaplan* action was originally filed in North Carolina state court. Defendants removed  
20 the *Kaplan* case and plaintiff properly filed his motion to remand, but the case was transferred to  
21 this Court before the district court in North Carolina ruled on the motion.

22 The *Microprocessor* action was originally filed in Vermont state court. Defendants  
23 removed the *Microprocessor* case. The case was then transferred to this Court.

24 As the Court may recall from letters submitted by counsel for the defendants and the  
25 Indirect Plaintiffs, these parties are in the process of working towards an agreement on scheduling  
26 and management of the indirect purchaser actions that have come before this Court.

27 One June 2, 2005, pursuant to prior agreement between counsel, the various defendants  
28 answered or filed motions to dismiss in response to the Indirect Plaintiffs’ complaints. Defendant

1 Samsung then provided the Indirect Plaintiffs with notice on June 21, 2005 that the *Kinkade*,  
2 *Kaplan* and *Microprocessor* cases were to be consolidated with the direct purchaser actions  
3 pending in the MDL. Accordingly, pursuant to the terms of the Amended Pretrial Order No. 1, the  
4 Indirect Plaintiffs were required to seek relief from that Order by July 1, 2005.

5 On June 6, 2005 this Court entered a Notice and Order Setting Hearing in which this Court  
6 has directed the Indirect Plaintiffs in the *Kinkade* action to file a consolidated brief in opposition to  
7 the motions to dismiss by no later than August 17, 2005.

## 8 **II. ARGUMENT**

9 The interests of indirect purchaser plaintiffs are distinct from the interests of direct  
10 purchaser plaintiffs. To the extent any indirect purchaser cases remain before this Court after  
11 remand motions are considered, counsel who represent the interests of these separate classes of  
12 plaintiffs should determine how these cases are prosecuted. The direct purchasers' counsel's  
13 priorities and concerns are different from those of the indirect purchasers. For example, as indirect  
14 purchasers, Indirect Plaintiffs will be presenting a methodology at the class certification stage to  
15 demonstrate that at trial, plaintiffs will be able to prove damage at the consumer level that  
16 emanates from defendants' conspiracy. Conversely, the direct purchaser plaintiffs do not have this  
17 burden given that their injury would occur at the initial sale of the product at issue. Because of the  
18 additional proof hurdles faced by indirect purchasers, the indirect cases will necessarily focus on  
19 economic evidence from both the defendants and third parties that is different from evidence to be  
20 sought in the direct cases. Moreover, the Indirect Plaintiffs will retain their own experts to  
21 consider the sales data and other economic evidence regarding downstream markets for DRAM  
22 and to present damages models separate from the model presented in the direct purchaser action.<sup>1</sup>

23 Also, as the Court has now come to know, the Indirect Plaintiffs are facing pleading issues  
24 unique to them. They face motions to dismiss on standing and personal jurisdiction grounds with  
25 which the direct purchasers need not concern themselves. Counsel representing and retained by

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26 <sup>1</sup> Consistent with this, class certification in indirect purchaser cases requires different discovery  
27 generally. Also, this discovery may vary from state to state. As such, counsel for the indirect  
28 plaintiffs are best suited to oversee the scheduling and management of class certification briefing  
and discovery.

1 indirect purchasers, with experience in prosecuting these state indirect purchaser actions, should be  
2 responsible for supervising the opposition to these motions.

3 Lastly, counsel who were retained to represent the interests of indirect purchasers should  
4 be solely involved in negotiations concerning settlement. Just as co-lead counsel for the direct  
5 purchaser class cannot control litigation or negotiate settlements for direct purchasers pursuing  
6 individual actions (such as the OEMs in this instance), they cannot control the litigation of the  
7 indirect purchasers and direct the litigation or negotiate settlements for these distinct cases and  
8 classes. Indeed, the Amended Pretrial Order No. 1 already suggests that such a situation would be  
9 improper. *See* Amended Pretrial Order No. 1 at 5 (limiting co-lead counsel's authority to  
10 settlement negotiations "on behalf of plaintiffs and *the putative class*") (emphasis added).

### 11 **III. CONCLUSION**

12 For these reasons, applying the current leadership structure to the new indirect cases before  
13 this Court would tax the resources of already busy co-lead counsel, would threaten the interests of  
14 indirect purchasers, and would be improper. Accordingly, counsel for the Indirect Plaintiffs seek  
15 relief from application of the Amended Pretrial Order No. 1 to the extent it purports to place the  
16 management and prosecution of the indirect purchaser actions under the control of co-lead counsel  
17 for the direct purchaser class action. As the earlier letters to the Court represent, counsel for the  
18 indirect purchaser actions are already conferring with the defendants to establish separate case  
19 management for these cases. Such a structure and management plan will take into consideration  
20 the overlap of issues among the two groups of cases, but will also recognize the differences and  
21 ensure that the indirect purchaser plaintiffs are represented by separate counsel of their choosing.

22 DATED: July 1, 2005

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25 */s/ Dennis Stewart*

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**PROOF OF SERVICE**

*In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*  
MDL NO.: 1486

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action. I am employed in the County of San Diego, State of California. My business address is: 550 West C Street, Suite 1600, San Diego, CA 92101.

That on July 1, 2005, I served the following document(s) entitled: **JOINT APPLICATION FOR RELIEF FROM AMENDED PRETRIAL ORDER NO. 1** on ALL INTERESTED PARTIES in this action:

**SEE ATTACHED SERVICE LIST**

☐ **BY MAIL:** By placing a true copy thereof in a sealed envelope addressed as above, and placing it for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings, and other matters for mailing with the United States Postal Service. The correspondence, pleadings and other matters are deposited with the United States Postal Service with postage thereon fully prepaid in San Diego, California, on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY ELECTRONIC TRANSMISSION:** I caused the above-referenced document(s) to be transmitted electronically.

☒ **BY FAX:** I transmitted a copy of the foregoing document(s) this date via telecopier to the facsimile numbers shown on the attached service list. The facsimile machine I used reported no error and I caused the machine to print a transmission record of the transmission.

☐ **BY PERSONAL SERVICE:** I had such envelope delivered by hand where indicated.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 1, 2005, at San Diego, California.

*/s/ Anita Villanueva*

\_\_\_\_\_  
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